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No. 02-132

IN THE

Supreme Court of the United States

MOBIL CORPORATION AND HONEYWELL INTERNATIONAL INC.,
Petitioners,
v.
BRUCE W. ADKINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondents' principal argument against certiorari is that the court below did not actually decide the questions presented to it, and that, even if it had, its opinion would be unreviewable by this Court. Respondents are wrong.

Respondents attempt only a half-hearted defense of the indefensible proceedings below. It is the same defense advanced by the West Virginia court: that whatever their shortcomings, mass proceedings like this one are the only way to dispose efficiently of thousands of asbestos claims. Br. in Opp. ("Opp.") at 4 & n.2; App. to Pet. for Cert. ("App.") at 11a-12a. Even on its own terms, that claim is wrong: asbestos plaintiffs with actual injuries have sided *with petitioners* in this case, arguing that West Virginia's approach systematically under-compensates the sickest of the plaintiffs. *See* Br. *Amicus Curiae* of the Unofficial Comm. of Select Asbestos Claimants ("SAC") at 4, 7. More important, efficiency is the wrong benchmark when constitutional rights are at stake. The Court has made clear that the exigencies of the asbestos-litigation crisis cannot justify profound distortions of the civil justice system that are inconsistent with fundamental fairness. This case is no exception.

I. THIS COURT HAS JURISDICTION TO REVIEW THE FINAL DECISION BELOW.

The Court's jurisdiction here is plain. Petitioners' request for a writ of prohibition and/or mandamus was a separate proceeding before the West Virginia Supreme Court. The state court's decision to deny the writ is "final" as to that pro-

proceeding and hence reviewable under § 1257.[1] This straightforward jurisdictional rule is well established and uncontroversial. As the leading treatise explains:

> Applications for [writs of prohibition, mandamus, and *quo warranto*] are often filed in state courts as independent cases, even though they relate to a pending lawsuit. Such proceedings may be carried forward to conclusion before the primary litigation has come to an end. To be final for purposes of § 1257(a), the state court judgment must conclusively determine the *right of the applicant to the writ sought.*

Robert L. Stern, *et al.*, *Supreme Court Practice* 159 (8th ed. 2002) (emphasis added). The Court has often invoked this principle, in a variety contexts, to exercise jurisdiction. *See, e.g., Bullington v. Missouri*, 451 U.S. 430, 437 n.8 (1981) (double jeopardy claim); *Hudson Distrib., Inc. v. Eli Lilly & Co.*, 377 U.S. 386, 389 n.4 (1964) (declaratory judgment); *Weston v. City Council*, 27 U.S. (2 Pet.) 449, 452 (1829) (challenge to local tax).

Respondents' robust defense of the final judgment rule *see* Opp. 12-14, is thus entirely beside the point. Petitioners, who seek review of a judgment that is final under § 1257, have no occasion to challenge that rule. Nor, contrary to respondents' suggestion, do petitioners need or seek any exception to the rule. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975), which describes the rare circumstances in which the Court may review a *non*-final state judgment, Opp. 15 n.4, is of no relevance to this case.

Respondents actually join issue with petitioners only on their reading of "[t]wo of the three cases" cited in the peti-

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[1] The state court's decision also decides the merits of petitioners' federal constitutional claims. *See, e.g.*, App. 9a-14a (rejecting necessity of inquiry into commonality and prejudice on merits); 9a ("merits" determination given most substantial weight in deciding whether writ should issue). There is no basis for respondents' passing suggestion that the decision below presents "no important issue of federal law." Opp. 12.

tion. Opp. 14. According to respondents, those two cases are limited to their facts, and hold only that determination of a writ of mandamus is final if it *also* determines another, separate proceeding – the underlying trial court action. *Id.* But neither case invokes any such "two-for-one" requirement for finality. Rather, like all the cases cited in the petition and this brief, they clearly rest on the principle described above: that writ actions are separate proceedings, so that decisions denying writs are final for purposes of § 1257. *See, e.g., Bd. of Educ. v. Super. Ct.*, 448 U.S. 1343, 1346 (1980) ("petition for a writ of mandamus and/or prohibition was a distinct lawsuit which was fully and finally determined by the [state] Supreme Court's judgment"); *Madruga v. Super. Ct.*, 346 U.S. 556, 557 n.1 (1954) ("The State Supreme Court's judgment finally disposing of the writ of prohibition is a final judgment reviewable here under 28 U.S.C. § 1257."); *see also Hudson Distrib.*, 377 U.S. at 389 n.4 ("The fact that separate and unresolved issues are pending in the Ohio courts and subject to 'further proceedings' therein . . . does not render the judgment of the Ohio Supreme Court [denying writ] nonfinal.").

II. THE DECISION BELOW APPROVES A MASS TRIAL WITHOUT THE NECESSARY INQUIRY INTO COMMONALITY AND PREJUDICE.

1. Respondents' principal argument is that the court below did not forgo inquiry into whether the claims in question have enough in common to justify their aggregation for trial. According to respondents, that inquiry was undertaken when the court made its initial referral of all West Virginia asbestos cases to the mass litigation panel ("MLP") under Rule 26.01. Opp. 16. Respondents are wrong.

In support of their position, respondents offer a lengthy description of the administrative proceedings conducted prior to the November 2000 referral. Opp. 7-8, 16-18. But nowhere do they cite a single statement by any West Virginia judge finding that the thousands of cases transferred to the MLP have enough in common to justify a mass trial, or that

they can be tried together without unduly prejudicing the defendants. That is not an oversight. There is in fact no such finding, because the propriety of a mass trial was not remotely at issue during the administrative referral proceeding.

At issue then was simply whether the cases should be transferred to the MLP for proceedings consistent with Rule 26.01. Rule 26.01 itself says nothing at all about mass trials, and nothing to suggest that transfer to the MLP will lead to a mass trial rather than, say, a routine consolidation for pretrial discovery. *See* Pet. for Cert. ("Pet.") at 6; App. 36a. Indeed, the presiding judge confirmed that the referral inquiry under Rule 26.01 did not presuppose any mass trial: "I don't mean that by putting this litigation in the hands of the Mass Litigation Panel that what I would do is throw together one big monster trial. I'm not sure that anybody wants that . . . ." Tr. of Hr'g at 12, *In re Asbestos Litig.*, Cir. Ct. of Kanawha Cty., W. Va. (Mar. 1, 2000) (statement of Judge MacQueen). In short, referral to the MLP is not the equivalent of a referral for mass trial, and any "commonality" inquiry associated with that referral is not equivalent to a finding that upwards of 8,000 cases filed against 250 defendants have enough in common that they may be *tried* together. *See* Pet. 15 n.16.[2]

The subsequent proceedings in West Virginia confirm this obvious point. The trial judge announced, *after* the referral, that he would make the traditional findings before he consolidated even two asbestos cases for trial, *see* Tr. of Hr'g at 98, *In re Asbestos*, Civ. Action No. 01-C-9000 (Cir. Ct. Kanawha Cty., W. Va. Feb. 12, 2001), and on May 23, 2001, he entered a "master plan" rejecting a mass trial. Pet. 7. On July 6, 2001 – more than seven months *after* the initial refer-

[2] Respondents' suggestion that some defendants consented to a mass trial during the referral proceeding, Opp. 17, badly misrepresents the record. Petitioners did consent to the initial referral, but – in keeping with the assurances of the presiding judge – only with the express proviso that referral would *not* entail a mass trial. *See* Mobil Corp.'s Resp. to Certain Pls.' Mot. for Mass Trial at 2, *In re Asbestos Litig.*, Civ Action No. 01-C-9000 (Cir. Ct. Kanawha Cty., W. Va. Mar. 30, 2001).

ral – the West Virginia Supreme Court refused to review constitutional claims associated with mass trial procedures on the ground that "*no decision has been reached as to whether mass trials will be held or not.*" *State ex rel. Allman v. MacQueen*, 551 S.E.2d 369, 373 (W. Va. 2001) (emphasis added). There is no way to square this history with respondents' contention that the referral was based on a finding of sufficient commonality to support a mass trial.

In fact, it was not until the Trial Scheduling Order of September 6, 2001, that any West Virginia court held that the cases referred to the MLP would be aggregated for a mass liability trial. Pet. at 7. That decision was unaccompanied by any findings of commonality. Instead, it was accompanied by findings of a *lack* of commonality: Judge Gaughan held that it was the myriad factual *differences* in the cases referred to the MLP that precluded their efficient resolution by "small-group" trials. *See* 9/6/01 Report at 2 ("multiple defendants and their defense attorneys, varying exposures to asbestos and different theories of liability [make it] futile to continue to pursue small all-issue trials").[3]

And no West Virginia court has inquired since then into whether there is enough commonality in the claims of 8,000 plaintiffs against 250 defendants to support a mass trial, or whether defendants would be prejudiced by such a remarkable undertaking. The court below expressly abandoned that inquiry, ruling that Rule 26.01 "supersedes" the ordinary standards that govern aggregation for trial, App. 9a-14a – an unequivocal holding that respondents nowhere address.

Nor do respondents appreciate that an inquiry into *prejudice* is a distinct requirement of the Due Process Clause. Even if respondents' characterization of the initial referral order were accurate – which it decidedly is not – it would on

[3] The September 6, 2001 order aggregated for mass trial all asbestos claims filed up to that date. Respondents attempt no explanation for how a referral inquiry undertaken in November of 2000 could consider the commonality of claims filed almost a year later.

respondents' own account encompass only the necessary finding of commonality. Respondents make no effort at all to suggest that any West Virginia court has ever considered whether defendants will be prejudiced by this extraordinary mass trial – a failure that by itself conflicts with other courts' decisions and clearly violates defendants' due process rights. *See* Pet. 13-15, 17; *see also* Mem. of DaimlerChrysler Corp., *et al.*, in Supp. of Pet. at 6-7.

2. The court below approved a mass trial to decide at one time the "fault" of each of hundreds of differently situated defendants – including "whether and for what time period any defendant manufacturers sold or distributed a defective asbestos-containing product." App. 26a. Respondents claim that the issue is premature because the precise "common issues" to be put to the jury had not yet been determined when the court reached its decision. Opp. 19. That objection misunderstands the nature of the due process violation claimed. Petitioners' position is that the due process violation inheres in *any* effort to determine the "fault," so defined, of hundreds of defendants as to thousands of plaintiffs in one proceeding without first inquiring into whether there is sufficient commonality to aggregate those claims, and whether defendants will be unduly prejudiced. Pet. 18-19 & n.19.[4] The court below disagrees. App. 9a-10a. That issue is sharply and cleanly presented for this Court's resolution.

3. The ruling of the court below is in conflict with decisions of other courts. Pet. 13-15. Respondents attempt at length to distinguish those cases on their facts, Opp. 21-25, but never once quarrel with the proposition for which the petition cites them: that in jurisdictions outside West Virginia, an inquiry into commonality and prejudice is understood to

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[4] Contrary to respondents' characterization, Opp. 19, it is not petitioners' position that an aggregated trial of asbestos claims can never be conducted consistent with the Due Process Clause. Rather, it is that any aggregation for trial must be preceded by an inquiry into commonality and the potential for prejudice.

be a requirement of due process. It is that principle that creates the conflict with the West Virginia court's decision to dispense with such an inquiry.

Instead, respondents speculate that none of cases cited forecloses the aggregation at issue here. *Id.* We think any court conducting the necessary inquiry into commonality and prejudice would reach precisely the opposite conclusion.[5] But that is not the point. The point is that a court cannot, consistent with due process, refuse to even conduct the inquiry. That is the principle for which those cases are cited – and that is the point respondents never address.

III. THE DECISION BELOW APPROVES APPLICATION OF WEST VIRGINIA LAW TO CLAIMS WITH NO CONNECTION TO THE STATE.

1. Respondents argue that the decision of the West Virginia Supreme Court does not "address [the choice-of-law] issue in any way." Opp. 26. In fact, the decision does more than address the issue; it effectively and expressly approves the application of West Virginia law.

Defendants argued below that without pretrial discovery, they would have no opportunity to invoke the rule of *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), against application of West Virginia law to claims without any connection to the State. The court nevertheless denied defendants even minimal pretrial discovery. Pet. 22-23; App. 15a-16a & n.18. That ruling is logically and necessarily a holding on the substantive choice-of-law question, as well. If defendants cannot discover where a given plaintiff resides or was exposed to asbestos, then they cannot make a *Shutts* challenge to application of West Virginia law – which means that forum law applies as the default choice to all of the aggregated

[5] Nor do the West Virginia and Maryland cases cited by respondents, *see* Opp. 4-5, suggest that traditional practice has evolved to permit aggregations like this one. A trial determining "what asbestos is" and the "state of the art" available to first-generation asbestos defendants cannot be compared to a trial to determine the "fault" of 250 defendants.

claims. Pet. 22-23. And this is so despite the fact that thousands of those claims have no connection whatsoever to West Virginia. App. 22a (Maynard, J., concurring).

Respondents elide this problem altogether, focusing instead on the petition's citations to page 7a of the appendix. Opp. 26 & n.10. What appears there is confirmation of the West Virginia Supreme Court's choice-of-law holding: in the one instance in which it was necessary to identify a particular statute – the statute that would apply to the claims of all employees against all employers, regardless of their location – the court below approved the trial court's selection of the *West Virginia* Code, § 23-4-2.

If further confirmation were needed, it was provided at the August 12, 2002, trial court hearing. Contrary to respondents' contention, that hearing did not mark an initial choice-of-law ruling. Instead, the judge – in remarkably candid terms – made clear his understanding that he was following the dictates of the West Virginia Supreme Court:

> *We are not going to change anything* other than . . . fracturing the deliberate intent cases. We understand the argument made regarding choice of law. We understand that there may be plaintiffs that absolutely have no nexus whatsoever. I don't know. But we do know that in order to get some order out of this asbestos chaos we are going to apply West Virginia law in all aspects of the first phase of the trial . . . and only West Virginia law.

Tr. of Hr'g at 172-73, *In re Asbestos*, Civ. Action No. 02-C-9004, (Cir. Ct. Kanawha Cty., W. Va. Aug. 12, 2002) ("8/12/02 Tr.") (emphasis added).

2. Respondents also argue that *Shutts* never comes into play here at all because petitioners have not shown both the specific state laws that should apply in lieu of forum law and the conflict between those laws and West Virignia law. Opp. 28. Or, put differently, a state court may opt out of the constitutional regime established by *Shutts* by refusing the dis-

covery needed to make the showing respondents describe. But *Shutts*, of course, is not limited to state proceedings in which defendants are afforded discovery before trial. On the contrary, *see* Pet. 23, the holding below conflicts with many cases requiring that aggregated proceedings include an individualized choice-of-law analysis.

Respondents also emphasize the fact that any choice-of-law holding below applies only to the initial "fault" phase of the trial. Opp. 27, 28. But a *Shutts* violation may not be overlooked simply because it is confined to one phase of a mass trial. Indeed, the federalism concerns underlying *Shutts* will be sharply implicated during the fault phase of this trial, during which West Virginia law will be applied to issues – like punitive damages, foreseeability, and the operation of workers' compensation statutes – on which there are substantial and important differences among the States. *See* Br. of 3M Co. as *Amicus Curiae* at 11-14; Br. of Resp'ts in Supp. of Pet'rs at 22-27; Pet. 26.

* * *

It is too late in the day to suggest, *see* Opp. 15-16, that a defendant with a strong case on the merits has nothing to fear from a mass trial like this one. Respondents make no effort at all to come to terms with the fact, now amply documented, that mass proceedings generate intense pressure to settle even meritless claims. Pet. 28-30; *see also* Br. *Amicus Curiae* of the Chamber of Commerce of the United States & the Am. Chemistry Council at 13-17 (effects of pending asbestos claims on defendants' stock prices and access to capital).

That pressure becomes virtually irresistible when, as here, the only alternative to settlement is a patently unconstitutional proceeding that offers no meaningful opportunity to present an individual defense to the jury, promises "punitive damages multipliers" assessed before any finding of injury, and threatens causation and damages findings based on statistics, not trials. Pet. 29-30. It is no surprise that none of the claims aggregated for trial in *State ex rel. Appalachian*

Power Co. v. MacQueen, 479 S.E.2d 300 (W. Va. 1996), the prior proceeding much touted by respondents, ever proceeded to a final judgment; all were settled. 8/12/02 Tr. at 109. In fact, no asbestos case consolidated for mass trial in West Virginia has *ever* proceeded to final judgment. Tr. of Hr'g at 59, *In re Asbestos*, Civ. Action No. 01-C-9000, 99-C-183REW (Cir. Ct. Kanawha Cty., W. Va. Mar. 16, 2001).

Coerced settlements of meritless claims are not only unfair to defendants; they are also adverse to the interests of truly ill plaintiffs. For that reason, lawyers representing cancer victims have taken the extraordinary step of filing an *amicus* brief in support of petitioners here. As they explain, cancer claimants are the "ultimate losers" when defendants are forced by mass proceedings to settle meritless cases: "[Such] consolidations force defendants to pay exorbitant sums to settle cases involving no injury, thus inviting the filing of more unimpaired cases, thus causing another round of bankruptcies, and ultimately thus ensuring that cancer claimants are uncompensated." SAC Br. at 7.[6]

The other result of coerced settlements, of course, is that post-trial review becomes practically unavailable. If defendants like petitioners are forced to settle, then they will lose their only opportunity to bring their constitutional claims before the Court. And the upshot will be that the very coerciveness of the unconstitutional proceedings below will forever insulate them from judicial review. Immediate review by this Court is both appropriate and necessary.

CONCLUSION

For the foregoing reasons, the petition should be granted.

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[6] Nor would deferred review, assuming it were available, be in the interest of sick plaintiffs. Sick claimants should not be required to suffer through an obviously unconstitutional mass trial and protracted post-trial appeals, only to be begin again when the verdict is ultimately set aside.

Respectfully submitted,

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